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No. 95-1158

In the Supreme Court of the United States

OCTOBER TERM, 1995

RONALD C. BROWN, ET AL.,
PETITIONERS,
v.
HOT, SEXY AND SAFER PRODUCTIONS, INC., ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether any constitutional right of parents to direct the upbringing of their children has been violated by mandatory attendance at a high school assembly for ninety minutes where they were exposed to hearing speech they regard as offensive but were not required to do anything else and where there is no prospect of further exposure.

2. Whether parents and their children in high school have a claim for violation of their right to procedural due process where the school committee has a mandatory, non-discretionary policy requiring without exception that they be given notice of an AIDS awareness assembly and the opportunity to opt out of attending but school officials failed to follow that policy on one occasion.

RULE 29.1 STATEMENT

Respondent Hot, Sexy and Safer Productions, Inc. is a California corporation with no parent companies or subsidiaries. Respondent the Chelmsford School Committee is a department of the Town of Chelmsford, Massachusetts, which is a municipal corporation with no parent companies or subsidiaries.

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STATEMENT OF THE CASE

The Petition omits critical, dispositive facts which were alleged in the Amended Complaint and upon which the District Court and the Court of Appeals relied. Paramount are that the AIDS awareness assembly attended by the two plaintiff[1] high school students lasted only ninety minutes; that neither student was required to do anything other than attend and listen; and that, immediately after the assembly, school

[1] Petitioners are referred to herein as "plaintiffs". Respondents, defendants in the District Court, are referred to herein either as "defendants" or by their titles or positions, e.g., "the school committee".

officials took steps to insure that their written Policy requiring an opportunity to opt out of attending would be followed for any similar programs in the future. [A.C. ¶¶ 2, 26, 41, 46, and Exh. D. p. 2].[2] Plaintiffs' ninety-six paragraph pleading made no allegation that the circumstances would be repeated or that the plaintiff students faced any prospect of systematic and required continuing exposure to speech such as occurred at the assembly. [A.C. ¶¶ 1-96].

Moreover, the Petition is apparently crafted to urge this court to review the content of the assembly. Therefore, it carefully culls selected passages from the alleged transcript which was annexed to the Amended Complaint. Plaintiffs, however, fail to acknowledge the numerous instances in which the performer warned the students about the dangers of drug, alcohol and tobacco use; admonished them against unprotected sexual activity; provided information about how the AIDS virus is transmitted; counseled the students to resist peer pressure to engage in casual sexual activity; stressed the importance of communication, honesty and trust in personal relationships; and urged them to talk with their parents. [Pet. at D-6-12, -28-29, -46, -51-52, -56, -61]. Defendants otherwise rely on the facts set forth in the opinions of the District Court and of the Court of Appeals.

The District Court ruled that none of the five substantive federal law claims in the Amended Complaint alleging "deprivation of privacy rights", "substantive due process", "procedural due process", "free exercise of religion" and "sexual harassment" stated a cause of action. [Pet. at A-5-20]. The District Court deferred entry of judgment and gave plaintiffs an opportunity to cure the defects in their Amended Complaint, but they failed to respond. Dismissal followed, as did an appeal. The Court of Appeals agreed with the District Court and affirmed. [Pet. at C-1-30]. Plaintiffs did not file a petition for rehearing or suggestion of rehearing en banc.

[2] References to the Petition and its Appendix are designated as "[Pet.]". Since plaintiffs were allowed to proceed on appeal without an Appendix, references to the Amended Complaint are designated as "[A.C. ¶]".

REASONS FOR DENYING THE PETITION

The Petition should be denied because this case raises no issues of such importance that this Court's intervention is required or appropriate; because the courts below have correctly decided the case; and because the Court of Appeals' decision conflicts neither with any decision by this Court or with any decisions by other courts of appeals.

I. NO IMPORTANT QUESTION OF FEDERAL LAW IS RAISED BY THE DISMISSAL OF PLAINTIFFS' ALLEGATIONS OF AN ISOLATED, LIMITED EXPOSURE TO SPEECH THEY CONSIDER OFFENSIVE, WHICH HAS NO PROSPECT OF REPETITION.

In formal deference to Supreme Court Rule 10.1(c), plaintiffs assert baldly that "this case presents questions of major importance to parents, students and public school officials nationally." [Pet. at 4]. In fact, it raises no important question of federal law which needs resolution by this Court. The Petition pivots on an isolated failure by local school officials to follow their own mandatory opt-out policy on one occasion. Plaintiffs complain merely that the students were exposed for ninety minutes to speech which they and their parents regard as offensive. There is no prospect of repetition. Although nearly four years have elapsed since the assembly, plaintiffs can point to no other cases involving like circumstances, nor can they assert additional violations of the policy in defendants' school system or violations of similar policies in any other school system. Instead, to support their argument plaintiffs trot forward only a single newspaper article. [Pet. at 4 n.1]. The District Court and the Court of Appeals each ruled on the insufficiency of the particular allegations made, or not made, in the Amended Complaint. [Pet. at A-2, -13, -17, -18; C-6, -10, -19, -25]. This Court should resist an invitation to grant the writ solely to decide whether these fact-specific

assertions included by plaintiffs in their pleading survive scrutiny under Fed. R. Civ. P. 12(b)(6).[3]

II. THE LOWER COURTS FOLLOWED THIS COURT'S PRIOR DECISIONS REGARDING THE RIGHTS OF PARENTS CONCERNING THEIR CHILDREN'S EDUCATION.

In another effort to bring this case within Rule 10.1(c), plaintiffs assert that the writ should issue because "[t]he judgments of the lower courts in the instant case are in direct conflict with prior important rulings of this Court which clearly established the fundamental nature of the constitutional right of parents and families to guide and direct the education and upbringing of their own children." [Pet. at 4]. Plaintiffs anchor their claim on two purported deviations from the holdings of this Court. First, plaintiffs assert, the Court of Appeals and the District Court ignored decisions by this Court recognizing a fundamental right of parents to direct the education and upbringing of their children. Second, plaintiffs argue, the lower courts failed to follow other cases decided by this Court permitting public officials to restrict sexually explicit speech. In fact, the courts below decided each of these questions in a manner entirely consistent with this Court's prior decisions.

Plaintiffs' contention that the Court of Appeals failed to properly acknowledge "the fundamental right of parents to direct the education and upbringing of their own children, a right which this court has consistently upheld" [Pet. at 5]

[3] The notion that such limited conduct as is alleged here implicates a national "weakening of the family" which mandates this Court's attention [Pet. at 4] is simply absurd. *See Lee* v. *Weisman*, 505 U.S. 577, 590-91 (1992) (distinguishing school prayer from offensive secular speech and expressing confidence in the ability of high school students to learn to endure offensive speech and to counter it). Even if the staging of the mandatory assembly warranted corrective action, the prompt response of school officials the very next day supplied a remedy.

relies on *Meyer* v. *Nebraska*, 262 U.S. 390 (1923) and *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). *Meyer* involved a statute which mandated that parents send their children to public schools and prohibited enrollment in private schools. In *Pierce*, this Court struck down a statute making it a *criminal* act to teach any child below eighth grade in any language other than English. The Court of Appeals correctly noted that *Meyer* and *Pierce* stand for the proposition that the state does not have the power to "completely foreclos[e] the opportunity to choose a different path of education." [Pet. at C-13].

The holdings in *Meyer* and *Pierce*, however, do not "encompass[] a fundamental constitutional right to dictate the curriculum at the public school to which [parents] have chosen to send their children." [Pet. at C-13]. As the Court of Appeals observed:

> [i]f all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater to a curriculum for each student whose parents had general moral disagreement with the school's choice of subject matter. We cannot see that the Constitution imposes such a burden on state educational systems, and accordingly find that the rights of parents as described by *Meyer* and *Pierce* did not encompass a broad-based right to restrict the flow of information in public schools.
>
> *Id.*[4]

Nor do cases concerning the free exercise of religion, such as *Wisconsin* v. *Yoder*, 406 U.S. 205 (1970) [Pet. at 8], compel

[4] Plaintiffs' collection of decisions by this Court recognizing "the family" "as a right of first importance" [sic] [Pet. at 6] contains no cases even remotely suggesting that mere exposure to speech on one occasion implicates that right. *See, e.g.*, *Prince* v. *Massachusetts*, 321 U.S. 158 (1944); *Ginsberg* v. *New York*, 390 U.S. 629 (1968); *Santosky* v. *Kramer*, 455 U.S. 745 (1982); *Meyer*; *Pierce*.

a different result on this record. The Court of Appeals specifically found the allegations of the Amended Complaint to lie outside the narrow ambit delineated in *Yoder*. Plaintiffs' "free exercise claim" is "qualitatively distinguishable from that alleged in *Yoder*" [Pet. at C-24], which turned on a long-established and highly restrictive way of life. *Yoder* involved a convincing demonstration by the Amish defendants of:

> the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the State's enforcement of a Statute generally valid as to others.

[Pet. at C-25] [quoting *Yoder*, 406 U.S. at 235]. Plaintiffs, in contrast and despite three opportunities, have not alleged that "the one-time compulsory attendance at the Program threatened their entire way of life." [Pet. at C-25]. Indeed, the Amended Complaint is devoid of any details of plaintiffs' religious beliefs. Furthermore, like *Pierce*, *Yoder* upheld the right of the Amish to remove their children from public schools. It did not create a parental right to micromanage the curriculum in the public schools through lawsuits for damages.

Equally without merit is plaintiffs' suggestion that *Bethel School District No. 403* v. *Fraser*, 478 U.S. 675 (1986) and *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), create a constitutional cause of action for damages against local school officials. In *Fraser* and *Pacifica*, this Court ruled that, in certain circumstances, public officials may restrict offensive or vulgar speech. Those cases, as the Court of Appeals found, "uphold the *state's* limited power to regulate or discipline speech to protect minors from offensive or vulgar speech". [Pet. at C-14] [emphasis added]. No decision of this Court, however, *requires* public officials to insulate students from exposure to offensive language or subjects them to a private

right of action when they fail to do so. Thus, the Court of Appeals properly affirmed the District Court's conclusion that "these cases 'do not create a private cause of action against state officials for exposure' to patently offensive language." [Pet.at C-14].[5]

On the record before this Court, "parental notification and consent" [Pet. at 12] are plainly not constitutional requirements. Plaintiffs have failed to cite a single decision of this Court or of any court of appeals holding that school officials are liable for failure to give prior notice or obtain parental consent for a one time assembly. The state court authorities on which plaintiffs rely (referred to as "cases from varying circuits" [Pet. at 12-14]) similarly do not hold that an "opt-out opportunity" is constitutionally mandated. These cases address ongoing curricular requirements or continuing school programs and hold that, in some circumstances, parental notification and consent will negate any constitutional objections. The record here, involving one time attendance at a single school assembly and no particularized showing of harm to religious beliefs, does not compel or support the sweeping extension of this Court's prior decisions which plaintiffs seek.

III. THE COURT OF APPEALS' HOLDING THAT SCHOOL OFFICIALS' ISOLATED FAILURE TO FOLLOW THE SCHOOL COMMITTEE'S MANDATORY OPT-OUT POLICY WAS A RANDOM, UNAUTHORIZED ACT IS IN COMPLETE HARMONY WITH THE STANDARDS FOR PROCEDURAL DUE PROCESS CLAIMS ESTABLISHED BY THIS COURT.

The Petition asserts that the lower courts resolved plaintiffs' procedural due process claim in a way which conflicts with

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[5] Plaintiffs also cite *Vernonia School District* v. *Acton*, 515 U.S. ___, 115 S.Ct. 2386 (1995) [Pet. at 10]. *Vernonia*, however, was decided in a vein similar to *Fraser* and *Pacifica*, and held merely that the *state* could subject students to drug testing in certain circumstances. 115 S.Ct. at 2396.

Zinermon v. *Burch*, 494 U.S. 113 (1990). Both courts concluded that school officials' failure to follow the mandatory opt-out provision in their own Policy was a "random, unauthorized act" for which plaintiffs could not recover under 42 U.S.C. § 1983. [Pet. at A-11-14, C-14-20]. *See Parratt* v. *Taylor*, 451 U.S. 527, 543 (1981); *Hudson* v. *Palmer*, 468 U.S. 517, 533 (1984). Those rulings were correct.

Initially, plaintiffs concede that the school committee's Policy concerning the health curriculum is the state law source of any liberty interest which the plaintiff students might have in avoiding mere exposure to "lewd and indecent communications". [Pet. at 16; A.C. ¶ 46].[6] *See Kentucky Dep't of Corrections* v. *Thompson*, 490 U.S. 454, 461-64 (1989) [citations omitted]. The Policy provides that "[p]ositive subscription, with written parental permission, *will* be a *prerequisite*." [A.C. Exh. D p. 1] [emphasis added]. It vests no discretion or judgment in school officials and permits no exceptions. Plaintiffs acknowledge that the Policy's procedures were imperative. [Pet. at 16, 19]. Notwithstanding these critical concessions, plaintiffs argue that the lower courts wrongly decided their claim because school officials' violation of the mandatory Policy on this occasion was "foreseeable". [Pet. at 16].

Plaintiffs' misunderstanding of the *Parratt-Hudson* doctrine and of *Zinermon* is evident from their own characterization of defendants' conduct. Rather than arguing that the Policy delegated any discretion to school officials, plaintiffs assert that those officials "made a deliberate policy decision to disobey their own fundamental procedures". [Pet. at 19].[7] In *Zinermon*, this court held that a procedural due process claim was not barred by *Parratt-Hudson* where the deprivation

[6] Defendants have at all times assumed that the Policy applied to the assembly solely for the purposes of their motion to dismiss.

[7] In fact, as plaintiffs admit, if the Policy had been followed they not only would have received predeprivation due process but would have been able to avoid the alleged deprivation altogether. [Pet. at 16].

was foreseeable and where it was possible to require predeprivation procedures but where, nonetheless, the state had chosen to give state officials "broad power" and uncircumscribed discretion. 494 U.S. at 135-38. *Zinermon*, however, also anticipated claims like plaintiffs', and strongly indicated that such cases fall within the "random, unauthorized act" exception. Accordingly, this Court drew an express (and explanatory) comparison between the circumstances in *Zinermon* and situations where state actors were bent upon effecting the substantive deprivation and would have done so despite any and all predeprivation safeguards. 494 U.S. at 137. The lower courts construing *Zinermon* are therefore in agreement that the *Parratt-Hudson* bar applies where the state provides mandatory predeprivation procedures but the state actor simply ignores them. *See Lowe* v. *Scott*, 959 F.2d 323, 343 (CA 1 1992); *Hartwick* v. *Board of Trustees of Johnson County Community College*, 782 F.Supp. 1507, 1514 (D. Kan. 1992) (a state rule directing officials " 'to hold a hearing before violating any rule or regulation would be senseless' " [quoting *Katz* v. *Klehammer*, 902 F.2d 204, 207 n.1 (CA 2 1990)]).[8]

Nor do plaintiffs gain any mileage from the fact that the implicated state actors included policymakers, i.e., school committee members. [Pet. at 17, 19]. As the District Court found, plaintiffs made "no allegation that any one of [the committee members], or all three acting together, were authorized to circumvent a policy adopted and enacted by the committee as a whole." [Pet. at A-14]. At least two other courts of appeals have concluded that even the involvement of a policymaking official in the state's failure to follow its own

[8] Throughout this litigation, plaintiffs have emphasized that the assembly was not the result of a carefully planned process and therefore was not in that sense "random". [Pet. at 17-18]. As both the District Court and the Court of Appeals pointed out, however, their focus is wrongly placed because their claim turns on an unpredictable and unforeseeable failure to follow the required opt-out procedure in the Policy. [Pet. at A-14, C-19].

procedures does not take a due process claim outside the *Parratt-Hudson* rule. *See Easter House* v. *Felder*, 910 F.2d 1387, 1400-05 (CA 7 1990), *cert. denied*, 498 U.S. 1067 (1991); *Johnson* v. *Louisiana Dep't of Agriculture*, 18 F.3d 318, 321-22 (CA 5 1994).

Plaintiffs cite no decisions to the contrary but rely, instead, on a doctrine of municipal liability under § 1983 which is simply irrelevant to this case. The Petition asserts that "[e]ven a solitary action taken by a person in a position of authority may be deemed the policy of a municipality, giving rise to municipal liability". [Pet. at 18] [citing *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 470 (1986)]. This rule is derived from *Monell* v. *Department of Social Services of City of New York*, 436 U.S. 658, 694 (1978) and its progeny, and holds that although a municipality is only liable for civil rights violations if those violations result from an official municipal "policy or custom", the actions of a policy-making employee can satisfy that standard. The "random, unauthorized act" exception, however, applies exclusively to procedural due process claims and is not concerned with *who* may be found culpable but, rather, with *when* culpability attaches. The school committee does not dispute that if there had been no policy, or if it had a policy which vested substantial discretion in school officials, the actions of at least the committee could bind the municipality under § 1983. The entirely different question at bar, however, is whether anyone can be held liable in a § 1983 action where the state has put in place required predeprivation procedures and there has been an unauthorized failure to use those procedures.

The decision of the Court of Appeals does not conflict with any decision of this Court, either directly or in principle. Nor does the Petition identify any conflict between the decision of the Court of Appeals and those of other federal courts. Instead, the court correctly decided this case under well-

established standards.[9,10]

CONCLUSION

For the reasons set forth herein, the Petition for a Writ of Certiorari should be denied.

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[9] Plaintiffs point to a possible alternative state law source for their liberty interest, citing M.G.L. c. 71, § 1. [Pet. at 16 n.3]. In pertinent part, that statute gives a student an absolute right to opt out of "instruction on disease" if his parent or guardian objects in writing on the grounds that such instruction "conflicts with his sincerely held religious beliefs". Like the Policy, it delegates no discretion or judgment to school officials. Therefore, even if § 1 controls rather than the Policy, plaintiffs' procedural due process claim suffers the same fate.

[10] Plaintiffs never contended that the State does not provide an adequate postdeprivation remedy. [Pet. at A-14, C-20]. *See Hudson*, 468 U.S. at 534-35.